No. 78-980

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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**GRAND TRUNK WESTERN RAILROAD COMPANY,**

*Petitioner,*

vs.

**DONALD R. BARRETT,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Grand Trunk Western Railroad Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on July 17, 1978.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 581 F.2d 132 (1978) and appears in the Appendix. The memorandum order and opinion of the United States District Court for the Nor-

thern District of Illinois entered on March 22, 1977, is reported at 81 LC ¶13,135 and appears in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1978. A timely petition for rehearing *en banc* was denied on September 21, 1978, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## QUESTION PRESENTED

Whether, consistent with the Military Selective Service Act, an employer may deny a returning veteran a benefit which the veteran lost the opportunity to obtain because of his absence due to military service, where the veteran did not have any right or expectation arising out of his pre-induction position to receive the benefit?

## STATUTORY PROVISION INVOLVED

United States Code, Title 38 §2021:

> Right to reemployment of inducted persons; benefits protected
>
> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such train-



> ing and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> (A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay; or
>
> (ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;
>
> (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> (i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or
>
> (ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties of any other position in

> the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter.

(b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.



(3) Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

## STATEMENT OF THE CASE

Commencing October 1963, respondent Donald Barrett was employed by petitioner Grand Trunk Western Railroad Company as a railroad fireman (R. 59). He held that position until May 1964, when he was terminated pursuant to Section II, Part C(2) of the Award of Arbitration Board 282 (R. 59). Part C(2) specifically provided:

> Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump

separation allowance in an amount to be determined as provided in Section 9 of the Washington Job Protection Agreement of May 21, 1936. (R. 17).

In April 1965, respondent was reemployed by petitioner, but this time as a railroad switchman (R. 59). The positions of fireman and switchman are not in the same employment craft (R. 80). Different collective bargaining agreements govern each position, and the seniority rights and privileges accruing to each position are contained in the respective agreement (R. 80). Separate seniority lists are maintained for each position, and employees included on one list are not named on the other (R. 80). Under the agreements, a switchman is not promoted to the position of fireman and vice versa (R. 80). Nothing in the collective bargaining agreements requires petitioner to offer vacant fireman positions to switchmen (R. 80). Respondent worked as a switchman until January 20, 1966, when he was inducted into the Armed Forces of the United States (R. 59).

Finding itself needing additional firemen, in May 1966, while respondent was still in military service, petitioner began to canvass former firemen severed under Part C(2) of the Award to determine their interest in the fireman positions (R. 69). Included in the canvass were both former firemen not then employed by petitioner in any capacity and former firemen then employed by petitioner in different crafts (R. 67). Among the C(2) individuals not canvassed for the newly available positions were those persons unavailable because of military service; petitioner did not offer respondent an opportunity to transfer to the fireman's job for this reason (R. 88). Several of those persons canvassed accepted petitioner's offer and were given new seniority dates as firemen and treated as new employees.



In March 1968, petitioner reinstated respondent as a railroad switchman and gave him a seniority date properly reflecting his military service (R. 41). Thereafter, respondent claimed he should have been reinstated to a fireman's position because during his absence other C(2) individuals were given opportunities to become firemen. Petitioner refused respondent's demand.

In July 1970, petitioner again sought additional firemen (R. 23). While not required to do so, petitioner offered each of its current employees, regardless of craft, the opportunity to become a railroad fireman (Prover dep.). Respondent accepted the offer and obtained an August 15, 1970 fireman's seniority date (R. 41).

On September 23, 1974, respondent filed a complaint against petitioner in the United States District Court for the Northern District of Illinois pursuant to §9 of the Military Selective Service Act of 1967 (50 U.S.C. App. §459)[1] (R. 1). As amended, the complaint alleged that but for his military service, respondent would have been offered a fireman's job effective July 27, 1967, and been given a seniority date at that time. Contending that petitioner's refusal to reinstate respondent as a fireman violated the Act, respondent prayed for an earlier fireman's seniority date and lost wages (R. 57).

On March 22, 1977, the district court granted respondent's motion for partial summary judgment and denied petitioner's cross-motion for summary judgment (R. 85).

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[1] Under Pub. Law 93-508 (88 Stat. 1578), The Act was recodified without substantive change as 38 U.S.C. §2021 *et seq.*, and is now known as the Vietnam Veterans' Readjustment Act of 1974.

The court held:

> We hold therefore, that the loss of an opportunity for a change in position which is factually due solely to an employee's absence for military purposes is a violation of the Military Selective Service Act.

(R. 85). The court ordered petitioner to give respondent an earlier seniority date and to determine any lost wages (R. 87).

On July 17, 1978, the United States Court of Appeals for the Seventh Circuit affirmed that decision. Writing for the court, Judge Pell stated that respondent had no seniority rights in the fireman's position by virtue of the Arbitration Award, and the court did not point to any right to the job arising from respondent's pre-service switchman's position. While noting that the May 1966 canvass for the fireman's positions was an exercise of managerial discretion, the court nonetheless held that respondent would have been a beneficiary of that discretionary exercise and, therefore, should have been afforded an opportunity to transfer upon his return from service.



## REASONS FOR GRANTING THE WRIT

### THE DECISION BELOW CONFLICTS WITH THE MEANING AND SCOPE OF THE MILITARY SELECTIVE SERVICE ACT.

38 U.S.C. §2021 provides in pertinent part:

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * *
>
> > (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
> >
> > > (i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay;
> >
> > * * *
>
> unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

And further:

> (b)(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

The Act should be liberally construed so that a veteran is not penalized because of his absence from his civilian employment. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284, 90 L.Ed. 1230, 1240 (1946). However, a returning veteran is not entitled under the Act to a perfect reproduction of past opportunities lost due to military service. *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 271-72, 2 L.Ed.2d 1305, 1310 (1958).

This case involves the interaction of those two policies in a setting not previously reviewed by this Court. At issue is whether, consistent with the Act, an employer may deprive a veteran the opportunity to transfer positions in his employment, an opportunity lost solely because of the veteran's engagement in military service, where the opportunity to transfer was not a perquisite of seniority in the veteran's pre-military service job. The seventh circuit's resolution in favor of the veteran directly and improperly affects the ultimate scope of an employer's duties and a veteran's rights under the Act.

1. The seventh circuit opinion conflicts with the Act's legislative history and this Court's decisions involving veterans' reemployment rights. The Act only protects a veteran's entitlement to rights arising out of his pre-service employment. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 287, 288, 90 L.Ed. 1230, 1242 (1946). Accord: 86 Cong. Rec. 11702 (remarks of Rep. May). In restating the "escalator principle" governing reemployment rights, this Court held that the veteran is entitled:



> . . . to a position which, on the moving escalator *of terms and conditions affecting that particular employment*, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

*Oakley* v. *Louisville & N.R. Co.*, 338 U.S. 278, 283, 94 L.Ed. 87, 91 (1949) (emphasis supplied).

Thus:

> [T]he statute manifests no purpose to give to the veteran a status that he could not have attained *as of right, within the system of his employment*, even if he had not been inducted into the Armed Forces but continued in his civilian employment.

*McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 272, 2 L.Ed.2d 1305, 1311 (1958) (emphasis supplied).

The Record indicates that respondent, in his pre-service position as a switchman, had absolutely no right arising under the bargaining agreements to transfer to the fireman craft. Furthermore, at the time of respondent's induction there were neither customs and practices under the agreement nor unilateral actions taken by petitioner which gave respondent the right to transfer to the fireman craft. The seventh circuit did not deny these facts, nor did it even attempt to identify the source of respondent's alleged pre-service right to transfer to the fireman craft. Instead, the court focused on the fact that if respondent remained on the job, he would have been offered an *op-*

*portunity* to transfer—an opportunity not afforded to all switchmen and, in fact, one totally unrelated to the switchman's job.

Thus, the seventh circuit's opinion has greatly expanded the parameters of the Act. By virtue of the decision below, the Act now not only protects veterans from the erosion of identifiable pre-service rights of seniority, it also prevents the loss of opportunities resulting from military service. Consequently, the opinion can affect myriad personnel decisions made during a veteran's absence, yet which do not concern or have any impact on a veteran's pre-service rights. For instance, if an employer opens a new department and without any obligation on his part gives his employees, regardless of seniority or craft, an opportunity to work in the new department, is a returning veteran entitled to a transfer to the new department, even if it means "bumping" another employee? The resolution suggested by the seventh circuit is not justified under the Act.

Furthermore, the decision below will directly affect persons taking advantage of employment opportunities during a veteran's absence. In this case, for example, persons who accepted the fireman positions will lose seniority rights in the fireman craft if respondent is given a retroactive seniority date. Such is unfortunately true even though respondent, like the others, had no right to a transfer and, furthermore, even though the employees have more actual working experience at the fireman's job than respondent. The results will be the same in countless other situations.

The problems and inequities which will result from the decision below warrants the issuance of a writ of certiorari.

2. By allowing respondent's claim for benefits in the absence of a clear right, the seventh circuit's ruling conflicts with decisions of other circuits faced with a similar question.



In *Conner* v. *Pennsylvania R. Co.*, 177 F.2d 854 (D.C. Cir. 1949), the court upheld a veteran's claim that he should be allowed to transfer to a different position and obtain a retroactive seniority date reflecting his military service. However, the court's ruling was grounded on provisions of the collective bargaining agreement, as well as on clearly established practice, which gave the veteran an opportunity to transfer positions. 177 F.2d 854, 859. In this case the seventh circuit did not even discuss either the applicable bargaining agreements or the unquestioned lack of any established practice in effect at the time of respondent's induction which would have given him a right to transfer.

Similarly, in *Gregory* v. *Louisville & N.R. R.*, 92 F. Supp. 770 (W.D. Ky. 1950) *aff'd* 191 F.2d 856 (6th Cir. 1951), plaintiffs, general laborers prior to their induction, claimed that upon their return defendant should have transferred them to the machinist helper craft and given them seniority dates ahead of junior laborers who had transferred crafts due to a shortage of helpers during plaintiffs' absence. In rejecting the claim, the court noted that separate collective bargaining agreements governed each position, and that the seniority gained in either position was not interchangeable. Furthermore, the court stated that the bargaining agreements did not allow for a transfer between positions, and the parties had not interpreted the agreements as requiring defendant to transfer laborers to fill the machinist helper vacancies. While recognizing that a strong probability existed that plaintiffs would have transferred had they remained at their jobs, the district court nonetheless ruled that plaintiffs had no right to transfer and, therefore, were not entitled to benefits. 92 F.Supp. 770, 776-77. The sixth circuit affirmed that decision.

In *Horton* v. *United States Steel Corp.*, 286 F.2d 710 (5th Cir. 1961), the court rejected the veteran's claim to transfer to other available work following his return from service. The court stated, *inter alia*, that plaintiff did not have an enforceable right under existing agreements to transfer positions. 286 F.2d 710, 712-13.

The decision below even conflicts with the seventh circuit's earlier decision in *Hewitt* v. *System Federation No. 152*, 161 F.2d 545 (7th Cir. 1947). In *Hewitt*, plaintiff, a car cleaner, sought a transfer to the position of car helper and a retroactive seniority date reflecting his military service. During plaintiff's absence, car cleaners junior to plaintiff were given an opportunity to transfer positions. The two positions were separately maintained, and the agreements governing the positions did not contain provisions allowing a transfer. The court found that in the absence of a right to transfer, plaintiff was not entitled to relief. 161 F.2d 545, 547.

The clear conflict among the circuit decisions justifies the issuance of a writ of certiorari here.

3. The decision below raises serious problems respecting the proper exercise of managerial discretion in employment matters. If the attainment of a benefit merely depends on some form of automatic progression reasonably certain to accrue, then the veteran's rights to the benefit is protected by the Act. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 589, 52 L.Ed.2d 595, 602 (1977); *Mc Kinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 272, 2 L.Ed.2d 1305, 1311 (1958). The determination of reasonable certainty must be made at the time of a veteran's induction into military service. *Tilton* v. *Missouri P. R. Co.*, 376 U.S. 169, 181, 11 L.Ed.2d 590, 597 (1964).



However, if the attainment of a benefit is dependent on the exercise of managerial discretion or on some other contingency, then the veteran is not entitled to the Act's protections. *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 589, 52 L.E.2d 595 (1977). As held in *McKinney* and clearly reaffirmed in *Tilton*, if the managerial discretion is not exercised prior to the entry into service, the veteran cannot satisfy the "reasonable certainty" requirement of the Act. *Tilton* v. *Missouri P. R. Co.*, 376 U.S. 169, 180, 11 L.Ed.2d 590, 597 (1964).

The seventh circuit conceded both that petitioner's actions in canvassing individuals for the fireman jobs was discretionary, and furthermore, that petitioner did not exercise its discretion prior to respondent's entry into service. Under this Court's decisions, such should have been sufficient to defeat respondent's claim. However, the court of appeals found that the failure to exercise discretion prior to entry into service is "not dispositive." This finding runs directly afoul of *Alabama Power*, *Tilton*, and *McKinney*.

More significantly, the court heavily relied on petitioner's concession that it would have offered respondent an opportunity to transfer had respondent remained on the job. In so doing, the court changed the entire focus of analysis from whether managerial discretion existed, to whether managerial discretion would have been exercised in the veteran's favor. Given this change, the seventh circuit decision paves the road for an entirely different type of claim under the Act. Prior to this decision, the mere showing of the existence of managerial discretion would defeat a veteran's claim for benefits. Under this decision, any veteran able to convince a judge or jury that he would have been the beneficiary of management's discretionary choice can now obtain relief.

Moreover, the decision below raises a fundamental question under the Act. Assuming that no one has a right to a given job, this case questions whether an employer may hire and later retain an individual in that position simply because the alternative candidate for the job was engaged in military service. Since the answer goes to the very heart of the proper administration of the Act, this case presents an important issue which should be resolved by this Honorable Court.

## CONCLUSION

For the foregoing reasons, petitioner Grand Trunk Western Railroad Company respectfully urges this Most Honorable Court to issue a writ of certiorari to review the judgment and opinion of the seventh circuit in this case.

Respectfully submitted,

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# APPENDIX

# APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 77-1584

DONALD R. BARRETT,

*Plaintiff-Appellee,*

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,

*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 2742—Frank J. McGarr, Judge.

ARGUED JANUARY 12, 1978—DECIDED JULY 17, 1978

Before PELL and TONE, *Circuit Judges*, and GRANT, *Senior District Judge.**

PELL, *Circuit Judge.* Plaintiff-appellee Donald R. Barrett was employed by defendant-appellant Grand Trunk Western Railroad Company as a locomotive fireman on October 25, 1963. He worked in that position until May

* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

6, 1964, when he was severed from Grand Trunk's employ pursuant to the provisions of the Award of Arbitration Board No. 282.[1] Under the terms of that award, firemen, such as Barrett, hired less than two years prior to the award's effective date ("C-2" firemen), could be separated from a carrier's payroll with a lump sum separation allowance, and have "all of their employment and seniority rights and relations terminated . . . ." On April 26, 1965, Barrett was again employed by Grand Trunk, as a switchman. He worked in that capacity until January 20, 1966, when he was inducted into the United States Marine Corps. On January 12, 1968, he was honorably discharged from the Marine Corps.

Thereafter, he sought reinstatement as a Grand Trunk employee, and received it, as a switchman, on March 8, 1968, with a switchman seniority date of April 26, 1965. This much, the parties agree, was clearly his due under the Military Selective Service Act, now codified at 38 U.S.C. § 2021 *et seq.*[2] The Act provides, on conditions indisputably met here, that any person "who leaves a

[1] Arbitration Board No. 282 was established by a unique law, Public Law 88-108, 77 Stat. 132, requiring compulsory arbitration of a major labor dispute which threatened to produce a devastating strike. The background is discussed in *Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt Railroad Company*, 385 F.2d 581, 588-92 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968); and Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 *De Paul L. Rev.* 115 (1964).

[2] The current codification is entitled the Vietnam Veterans' Readjustment Act of 1974. It carries forward without substantive change the provisions of the Military Selective Service Act which govern this case. These were previously found at 50 U.S.C. App. § 459. For convenience, we refer to these laws simply as the Act, and cite to the current codification.



position . . . in the employ of any employer in order to perform [military] training and service" "shall . . . be restored by such employer . . . to such position or to a position of like seniority, status, and pay." 38 U.S.C. § 2021(a)(2)(B)(i). Subsection (b)(2) adds the following:

> It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with [*inter alia*, the language just quoted] should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in the employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

Barrett claims that restoration to the job of switchman without loss of seniority was an inadequate satisfaction of his rights under the Act. He points out that in May 1966 Grand Trunk found itself in need of additional firemen. Apparently preferring to hire those with experience in the position to people without it, Grand Trunk canvassed many previously severed "C-2" firemen to determine their interest in becoming Grand Trunk firemen again. Only those "C-2" firemen predetermined to be unemployable or medically unfit, or who received unsatisfactory performance ratings when severed in 1964 (neither of which factors would have applied to Barrett),[3] or who

[3] Grand Trunk's argument in the district court that those with the same performance rating Barrett had were not canvassed has been abandoned on appeal.

were known to be in military service were not canvassed. Barrett thus asserts that but for his military service, he would have been canvassed and given an opportunity to become a fireman at that time, and that this opportunity should have been made available on his return from the Marines, with retroactive seniority.[4]

Grand Trunk did not accede to Barrett's several requests for such treatment, and he became a fireman only on August 15, 1970, when his application for transfer, made pursuant to a generally posted vacancy announcement, was accepted. He brought this lawsuit to obtain his "proper" seniority date and back pay, and has been represented therein by the United States Attorney. 38 U.S.C. § 2022.

The district court granted Barrett's motion for "Partial Summary Judgment (On Issue of Liability)" on March 22, 1977. On March 25, the court issued an order *nunc pro tunc* as of March 22, ordering Grand Trunk to adjust its records by giving Barrett the earlier seniority date he sought, and ordering both parties either to stipulate or to proceed with discovery on the question of the amount of back pay.

Grand Trunk has appealed, invoking (without traverse by Barrett) 28 U.S.C. § 1291 as a jurisdictional basis. Our obligation to satisfy ourselves about our jurisdiction in each case brought before us has required us to look be-

[4] The parties agree, and amicus Brotherhood of Locomotive Engineers argues at length, that the positions of switchman and fireman are separate crafts, and that each is a part of a distinct line of employee progression. Barrett, then, is rather obviously seeking enforcement of his asserted right to transfer, not a right to a promotion. It is also apparently undisputed that the position of fireman has a higher gross earnings potential than that of a switchman, and, significantly, leads to the position of locomotive engineer.



yond the parties' agreement on this point. Because a "final decision" within the meaning of § 1291 "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), the district court's order, which expressly leaves the question of back pay for future resolution, is not a final appealable order. *See The Palmyra*, 23 U.S. (10 Wheat.) 502 (1825); *Baetjer* v. *Garzot Fernandez*, 329 F.2d 798 (1st Cir. 1964); *Taylor* v. *Board of Education of the City School District of the City of New Rochelle*, 288 F.2d 600, 602 (2d Cir. 1961), *cert denied*, 368 U.S. 940; 9 MOORE'S FEDERAL PRACTICE ¶ 110.11 at 138 (1975).

Apparently recognizing this fact, Grand Trunk moved the district court to certify the case to us as one involving a controlling question of law, within the meaning of 28 U.S.C. § 1292(b). The motion was denied, as being "moot." We interpret this denial, cryptic as it is, as incorporating the district court's view that a basis for appeal was present without the certification. In this respect, we believe the court was correct, for the court's order expressly mandates that Grand Trunk act to correct Barrett's employment records, which, of course, was part of the substantive relief requested in the complaint. Accordingly, the order is an interlocutory one granting injunctive relief within the meaning of 28 U.S.C. § 1292(a)(1), and the case is properly before us. *See Roth* v. *Board of Regents of State Colleges*, 446 F.2d 806 (7th Cir. 1971), *rev'd on other grounds and remanded*, 408 U.S. 564 (1972)[5];

[5] Far from weakening the authority of *Roth* as pertinent here, the Supreme Court's reversal of this court's decision on the merits implicitly supports the decision on jurisdiction, as that Court, just as this one, is obliged to satisfy itself that it has jurisdiction of the cases brought before it.

*International Products Corporation* v. *Koons*, 325 F.2d 403 (2d Cir. 1963); *Zwack* v. *Kraus Bros. & Co., Inc.*, 237 F.2d 255 (2d Cir. 1956). *Compare George* v. *Victor Talking Machine Co.*, 293 U.S. 377 (1934) (per curiam), *with Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.* 385 U.S. 23 (1966).

We turn to the merits, cognizant of our duty liberally to construe the Act "for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), quoted in *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 584 (1977). "He who was called to the colors [is] *not to be penalized* on his return by reason of his absence from his civilian job." *Fishgold, supra* at 284 (emphasis added); *accord, McKinney* v. *Missouri-Kansas-Texas Railroad Co.*, 357 U.S. 265, 270 (1958).

At oral argument in this court, counsel for Grand Trunk conceded what had not really been disputed in Grand Trunk's brief: that Barrett would have been given an opportunity to transfer to a fireman's position at the time of the May 1966 canvass of "C-2" firemen if he had not been in military service. This concession takes us a long way towards affirmance of the district court's order, for Congress, after all, has mandated that a person in Barrett's position must not only be rehired, but also accorded "such status . . . as [he] would have enjoyed if [he] had continued in the employment continuously." 38 U.S.C. § 2021(b)(2).

To counter the apparent import of this statutory language, Grand Trunk argues that the decision to canvass "C-2" firemen was an act of managerial discretion



which had not occurred and was not foreseeable at the time Barrett entered the Marines, that Barrett could not have insisted on the transfer if he had stayed in Grand Trunk's employ and the opportunity had not been offered to him, and that this is accordingly not a case within the ambit of the Act. Principal reliance is on *McKinney* v. *Missouri-Kansas-Texas Railroad Co., supra.*

Although *McKinney* appears in some ways to support Grand Trunk's position, we think the appearance is deceptive. Just as an employee who serves in the military is not to be disadvantaged because of his absence, the Act was not intended to operate to favor the veteran "as against his fellows." *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 526 (1949); *accord, Fishgold, supra*, 328 U.S. at 286. Section 2021(b)(2) guarantees to the veteran only the status he "*would have enjoyed.*" (Emphasis added.) Determining what would have been is, by its very nature, a difficult task. Often we cannot know with any reasonable confidence. Thus to respect the principle that the veteran is not to be either disadvantaged or favored necessarily means there can be no "perfect reproduction" of what "*might* have been his" if he had not served his country. *McKinney, supra*, 357 U.S. at 271 (emphasis added). The Act simply "does not assure him that the past with all its possibilities of betterment will be recalled." *Id.* at 271-72.

The classic instance of this is the situation found in *McKinney* itself. There an employee asserted his "right" to a promotion that had been given to his juniors in seniority, even though the pertinent collective bargaining agreement expressly made such promotions a matter of fitness, ability, and "the exercise of a discriminating managerial choice." *Id.* at 272. Where an employer has and exercises such discretion in promoting one employee

over others, it may be possible to say that an individual's credentials and experience made him eligible for consideration, but there can be no reasonable certainty that the subjective factors which permissibly influence the choice would have produced a promotion for the individual. This is precisely what the Supreme Court held in *McKinney*,[6] because the Act's purpose is only to assure the veteran of the benefit of "those changes and advancements in status that *would* necessarily have occurred simply by virtue of continued employment." *Id.* (emphasis added). *See Tilton* v. *Missouri Pacific Railroad Co.*, 376 U.S. 169, 180 (1964).

Because what Barrett seeks is a change in status that would in fact necessarily have occurred if he had been continuously employed, *McKinney* cannot control this case. There is nothing here remotely akin to second-guessing a managerial evaluation of an employee's fitness for promotion, and relief for Barrett would pose no danger of "overriding an employer's discretionary choice," which concerned the Court in *McKinney*. 357 U.S. at 272; *see Pomrening* v. *United Air Lines, Inc.*, 448 F.2d 609, 613 (7th Cir. 1971). Indeed, all Barrett is asking is to be given the benefit of management's discretionary choice, which was concededly exercised in favor of a class ("C-2" firemen with satisfactory performance ratings) from which he was excluded only because he was currently serving his country.

To be sure, the discretionary choice that would have given Barrett a transfer but for his military service, had not been exercised, and may not have been foreseeable

[6] Emphasizing that it was the actual exercise of managerial discretion that was not to be second-guessed, the Court remanded to allow McKinney to plead and prove that as a result of custom or practice, he would necessarily have been promoted if he had been continuously employed. 357 U.S. at 273-74.



at the time Barrett entered the Marines. That is not dispositive. *Tilton* v. *Missouri Pacific Railroad Co., supra*, 376 U.S. at 179-81, and its companion case, *Brooks* v. *Missouri Pacific Railroad Co.*, 376 U.S. 182, 184-85 (1964), make clear that no rule of strict foreseeability applies under the Act.[7] The Act's requirement is simply that there be a reasonable certainty that the veteran would have enjoyed the status he claims but for his service. *Witty* v. *Louisville & Nashville Railroad Company*, 342 F.2d 614, 616-17 (7th Cir. 1965). That requirement is met here.

Nor need the circumstance on which a claimant such as Barrett bases his claim have developed before military service was begun. In *Alabama Power Co.* v. *Davis, supra*, 431 U.S. 581, a veteran was accorded pension credit for time in service, even though the pertinent pension plan was not established until after Davis entered the military. And in *Witty, supra*, the need for carmen mechanics had not developed and the promotional program to develop mechanics, on which Witty successfully based his claim for retroactive seniority, had not been adopted at the time Witty entered the service.

[7] *Tilton* did suggest that a claim for retroactive seniority made by an employee who had been selected for a promotional training program, but whose training had been interrupted by military service, is sufficient if it is shown that it was reasonably certain as a matter of foresight that the employee would have completed the program and obtained advancement, and, as a matter of hindsight, such did occur. This court has previously recognized that a foresight-hindsight test is useful outside the specific circumstances of *Tilton*. *Brickner* v. *Johnson Motors*, 425 F.2d 75, 77 (7th Cir. 1970). It is reasonable certainty, however, which is the generalizable test (as the authorities cited in *Brickner* indicate), not the foresight rule developed for guidance in the specific training context.

Grand Trunk's argument that Barrett would have had no right to demand the transfer if he had been continuously employed is basically irrelevant. "Status [within the meaning of § 2021(b)(2)] may be the result of a collective bargaining agreement, established employment practices of the employer, *or even some unilateral action of the employer.*" *Burke* v. *Boston Edison Company*, 279 F.Supp. 853, 856 (D. Mass. 1968) (emphasis added).

*Wood* v. *Southern Pacific Co.*, 447 F.2d 486 (9th Cir. 1971), is instructive on this point. The district court there was also considering the consequences of the Award of Arbitration Board 282, which was made after the plaintiff entered the service. Plaintiff had, like Barrett, been a fireman; unlike Barrett, however, his seniority as a fireman was sufficient under the terms of the award to put him in the class of firemen to whom the company was to offer comparable employment. The district court, after a full trial, expressly found that the award gave complete discretion to the company as to whether to offer, when to offer, what to offer, how many jobs to offer, and how long to offer them. This discretion was used to make differing offers in different seniority districts. 66 CCH Lab. Cas. ¶ 12,185, at 22,689 (C.D. Cal. 1969). Nonetheless, without overturning any of the district court's findings, the Ninth Circuit reversed the judgment for the company, because the company had in fact given those in Wood's work group the opportunity to be switchmen, and undeniably would have given Wood the same choice but for his absence on military service. *See also* Judge Grant's opinion in *Van Hoedt* v. *Wheelabrator-Frye, Inc.*, 77 CCH Lab. Cas. ¶ 11,148, at 19,928 (N.D. Ind. 1975), in which a veteran whose employment and seniority rights had expired under the collective bargaining contract after two years (post-service) on lay-



off status was held to have acquired new rights by the employer's unilateral act of recalling three employees junior to the veteran (whose seniority had also expired).

A related point pressed both by Grand Trunk and amicus Brotherhood of Locomotive Engineers, that Barrett is seeking to switch between entirely separate crafts with the Act's assistance, is without merit. *Wood, supra,* flatly rejected a conclusion of the district court based on just such reasoning, and ordered cross-craft relief. Indeed, if opportunities to transfer are within the ambit of the status protected by the Act, and they are, *see Horton* v. *United States Steel Corporation*, 286 F.2d 710 (5th Cir. 1961); *Conner* v. *Pennsylvania R. Co.*, 177 F.2d 854 (D.C. Cir. 1949), it is hard to understand even the premise of an argument based solely on an aversion to cross-craft relief.

The better formulation of the argument is that the decision to canvass "C-2" firemen benefitted people who were not then employed by Grand Trunk as well as those who were, and that switchmen *as a work group* were not canvassed. The latter point is quickly answered, as it is clear that switchmen with prior experience as firemen (such as Barrett) were canvassed. *See* the answers to plaintiff's second set of interrogatories. The former point is slightly more troubling, for pushed to an absurd conclusion, it might suggest that the fact of Barrett's employment with Grand Trunk when he entered the service was inconsequential, and that some ephemeral residual rights—inconsistent with the terms of the Award of Arbitration Board 282—are the only arguable bases for this action. Of course, that is not the case. The fact of Barrett's employment is critical to his success here; without it, he would not have left a position within the meaning of § 2021(a)(B)(i). Once it is clear, though, that he left a position and had a right

to be rehired, the question posed, and the only one we have been addressing, is what his status would have been if he had been continuously employed. The fact that the canvass that would have obtained for him a different and preferred status also benefitted those who were not then employed by Grand Trunk is irrelevant to that question.

For the reasons set out herein, the district court's order to Grand Trunk to accord Barrett an earlier seniority date is affirmed, and the case is remanded for further proceedings consistent herewith.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*



Opinion by Judge Pell

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 17, 1978

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

DONALD R. BARRETT,
Plaintiff-Appellee,

No. 77-1584 vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division No. 74-C-2742
Frank J. McGarr, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, and the case is Remanded for further proceedings, in accordance with the opinion of this court filed this date.

* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
September 21, 1978.

Before
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

DONALD R. BARRETT,
Plaintiff-Appellee,

No. 77-1584 vs.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division 74 C 2742
Frank J. McGarr, Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Grand Trunk Western Railroad Company, defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant of the Northern District of Indiana is sitting by designation.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD R. BARRETT,
Plaintiff.

v.

GRAND TRUNK WESTERN RAILROAD COMPANY, a corporation,
Defendant.

No. 74 C 2742

MEMORANDUM OPINION AND ORDER

This case comes before the court on plaintiff Barrett's motion for partial summary judgment and defendant Grand Trunk Western Railroad Company's cross-motion for summary judgment. The case has twice been before the court, i.e., once on defendant's motion to dismiss, which was denied in a memorandum opinion and order dated April 28, 1975, and once on defendant's motion for summary judgment, which was denied in a memorandum opinion and order dated May 16, 1976.

The case has been brought pursuant to 50 U.S.C. App. §459 (subsequently recodified in 28 U.S.C. §2021)—the Military Selective Service Act—which protects the re-employment rights of veterans honorably discharged from the armed forces. The statute provides for re-employment upon timely application and reads, in pertinent part:

> (B) [I]f such position was in the employ of a private employer, such person shall—

> (i) if still qualified to perform the duties of such position be restored by such employer or his successor in interest to the same position or to a position of like seniority, status and pay . . .
>
> * * *
>
> (C) *Service considered as furlough or leave of absence*
>
> (2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

The operative facts in this lawsuit are as follows.

Plaintiff Donald Barrett was initially employed by the railroad as a fireman on October 25, 1963. On May 6, 1964, pursuant to the provisions of Award of Arbitration 282, plaintiff was severed from defendant's employ, and received a lump sum settlement therefor. He was re-employed by defendant as a switchman on April 25, 1965, and remained in the position of switchman until his induction into the Marine Corps on January 20, 1966. On March 8, 1968, upon his release from the armed services, he was reinstated to his former position of switchman. On August 15, 1970, plaintiff became a fireman with a fireman's seniority date as of that date.

The problem herein arises from the following additional facts. A list of severed firemen was maintained by the railroad, and, apparently, twice the railroad utilized this list: once in 1964, to determine which persons, if any,



wished to return to the employ of the railroad in a position other than that of fireman, and once in May of 1966, to determine which, if any, of the once-severed persons, whether or not employed by defendant at that time, wished to return to the position of fireman for the railroad. Both plaintiff and defendant now seem to agree that Barrett would have received an offer had he not been on active Marine duty at the time.

In this court's earlier denial of defendant's motion for summary judgment, we held:

> [T]here exists in the present action a question of fact as to whether or not plaintiff would have received an offer and opportunity to change his position if he had been continuously employed, or whether he was denied the change of position due to his military commitment.

Plaintiff now moves for summary judgment on the grounds that that question of fact no longer remains. Defendant, on the other hand, resists the motion on the grounds that simple loss of an opportunity for a specific job, without more, is not sufficient to require the application of the protective shield of the Act.

Within the facts of this case, we must disagree with defendant's position. The leading cases in this area deal with the problems that arise because of the intricacies of union seniority systems. But the question in the instant case is whether the Act can reach problems arising outside of the seniority system[1] even though the solution

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[1] Defendant's contentions as to what "peer group" Barrett belongs would limit the Act's applicability to opportunities which arise solely out of operation of seniority systems and other union agreements or systems. While the statute involved obviously is intended to deal with problems arising by virtue thereof, we find no support for the contention that it is so limited.

necessarily affects that system. We find that it can. See, *Conner* v. *Pennsylvania R. Co.*, 177 F.2d 854 (D.C. Cir. 1949); *Wood* v. *Southern Pacific Co.*, 447 F.2d 486 (9th Cir. 1971). The fact that the opportunity arose after the employee had entered military service is not, in all circumstances, controlling. *Witty* v. *Louisville and Nashville Railroad Company*, 342 F.2d 614 (7th Cir. 1965); see, also, *Pomrening* v. *United Air Lines, Inc.*, 448 F.2d 609 (7th Cir. 1971). We hold, therefore, that the loss of an opportunity for a change in position which is factually due solely to an employee's absence for military purposes is a violation of the Military Selective Service Act. As noted in our earlier memorandum, we do not find any of the defendant's authorities to compel a different result in this factual setting. In so holding, we fulfill the declaration of congressional purpose that veteran Donald Barrett shall be restored "in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Accordingly, the motion of plaintiff Donald Barrett for partial summary judgment is granted, and the motion of defendant Grand Trunk Western Railroad Company for summary judgment is denied.

Enter

*Frank J. McGarr*
United States District Judge

Dated: March 22, 1977



UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DONALD R. BARRETT,

*Plaintiff*,

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
a Corporation,

*Defendant.*

CIVIL ACTION
File No. 74 C 2742

ORDER

In accordance with this Court's Memorandum Opinion And Order dated March 22, 1977, in which Plaintiff's Motion For Partial Summary Judgment was granted, it is now ORDERED that, within ten (10) days of the entry hereof, defendant correct its records to indicate and reflect that DONALD R. BARRETT has a fireman seniority date of July 29, 1967 and an engineer "informational date" of September 2, 1969, both immediately ahead of L. Stengel.

The parties are further ORDERED to attempt to stipulate or to conduct further discovery if required, to ascertain the amounts due and owing plaintiff which resulted from defendant's refusal to accord to him the fireman position and July 29, 1967 seniority date immediately upon reinstatement after military service on March 8, 1968.

Dated: ....., 1977.
United States District Judge

Sol #00035

No. 78-980

# In the Supreme Court of the United States

OCTOBER TERM, 1978

GRAND TRUNK WESTERN RAILROAD COMPANY,
PETITIONER

*v.*

DONALD R. BARRETT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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# INDEX



## CITATIONS

Cases:

# In the Supreme Court of the United States

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No. 78-980

GRAND TRUNK WESTERN RAILROAD COMPANY,
PETITIONER

*v.*

DONALD R. BARRETT

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 581 F.2d 132. The opinion of the district court (Pet. App. 15-18) is reported at 81 Lab. Cas. (CCH) ¶ 13,135.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on July 17, 1978. A petition for

rehearing was denied on September 21, 1978 (Pet. App. 14). The petition for a writ of certiorari was filed on December 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Military Selective Service Act requires petitioner to grant respondent seniority as a fireman retroactive to the date respondent would have begun work as a fireman but for his military service.

## STATEMENT

1. Petitioner employed respondent as a "C-2" locomotive fireman from 1963 to 1964, when respondent was discharged pursuant to a decision of Arbitration Board No. 282.[1] On April 26, 1965, petitioner hired respondent as a switchman, and petitioner worked in that position until he was inducted into military service on January 20, 1966 (Pet. App. 1-2). In May 1966, while respondent was on active duty, petitioner decided to hire more firemen, and it solicited applications from all eligible former "C-2" firemen except those in military service (Pet. App. 3-4).[2] If respondent had not been in the military, he would have been offered this opportunity to transfer to a fireman's job (Pet. App. 6).

[1] See Pub. L. No. 88-108, 77 Stat. 132; Pet. App. 2 n.1.

[2] Petitioner did not canvass unemployable or medically unqualified former firemen, or those who had received unsatisfactory ratings as firemen, but respondent was employable, medically fit and of proven competence (Pet. App. 3).



On January 12, 1968, respondent was honorably discharged from military service and sought reemployment from petitioner. He was rehired as a switchman with a seniority date of April 26, 1965 (Pet. App. 2). Respondent, however, maintained that he was entitled to transfer to a fireman's position under Section 9 of the Military Selective Service Act, recodified as 38 U.S.C. 2021, because he would have ~~88 U.S.C. (Supp. V) 2021, because he would have~~ been offered such a job in May 1966 but for his absence in military service. Petitioner denied respondent's request for a transfer, and respondent continued as a switchman until August 15, 1970, when he became a fireman pursuant to a routine vacancy in that craft (Pet. App. 4). Respondent was given no retroactive seniority as a fireman.

2. Respondent brought this action in the United States District Court for the Northern District of Illinois, seeking a judgment that he is entitled to a fireman's seniority date of July 29, 1967, the date he would have become a fireman under the May 1966 canvass. The district court concluded that the Act required petitioner to give respondent this seniority credit and granted partial summary judgment for respondent (Pet. App. 19).[3]

[3] The district court ordered the parties to stipulate the amount of back pay due respondent in light of the court's order, or to conduct further discovery on that question if necessary (Pet. App. 19). The court of appeals held that, notwithstanding the unresolved back pay question, the district court's order was appealable under 28 U.S.C. 1292(a). See Pet. App. 4-6.

The court of appeals affirmed. Noting that respondent would have been offered the fireman's position in May 1966 but for his military service (Pet. App. 6), the court reasoned that he was seeking "a change in status that would in fact necessarily have occurred if he had been continuously employed" (Pet. App. 8) and that petitioner therefore was required by the Act to provide it to him. See 38 U.S.C. 2021(b)(2). The court rejected petitioner's argument that because the decision to offer the new positions to former "C-2" firemen was discretionary, it was beyond the scope of the Act under *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265 (1958). "The Act's requirement is simply that there be a reasonable certainty that the veteran would have enjoyed the status he claims but for his service," the court of appeals stated. "That requirement is met here" (Pet. App. 9; citation omitted).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court.

1. Petitioner does not dispute the court of appeals' determination (Pet. App. 6) that respondent would have been offered the opportunity to become a fireman in May 1966 but for the fact that he was in military service at that time. Rather, it asserts that "[t]he Act only protects a veteran's entitlement to rights arising out of his pre-service employment" and therefore "an employer may deprive a veteran of



the opportunity to transfer positions in his employment, an opportunity lost solely because of the veteran's engagement in military service, where the opportunity to transfer was not a perquisite of seniority in the veteran's pre-military service job" (Pet. 10-11).

This is an incorrect statement of the Act's protections. The Act provides that a veteran who "makes application for reemployment * * * after * * * training and service * * * shall * * * be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay * * *" (38 U.S.C. 2021(a)(B)(i)) and that he "shall be considered as having been on furlough or leave of absence * * * [and] shall be so restored or reemployed without loss of seniority * * *." 38 U.S.C. 2021(b)(1). Congress declared that the veteran "should be so restored or reemployed in such manner as to give [him] such status in his employment as he would have enjoyed if [he] had continued in such employment continuously * * *." 38 U.S.C. 2021(b)(2).

Thus the fact that "respondent, in his pre-service position as a switchman, had absolutely no right * * * to transfer to the fireman craft" (Pet. 11) is irrelevant. That right was granted, during respondent's absence, to all qualified former "C-2" firemen, and only because respondent was on active duty was he unable to take advantage of it. As the court of appeals recognized (Pet. App. 9), the situation is comparable to that in *Alabama Power Co.* v. *Davis*,

431 U.S. 581 (1977), which held that the returning veteran was entitled to count his time in the military as time on the job for purposes of computing his pension benefits. The employer adopted the pension plan while Davis was on active duty (*id.* at 590) and so, like respondent here, Davis "in his pre-service position * * * had absolutely no right" to a pension (Pet. 11). Davis was enrolled in the pension plan after he returned from military service, just as respondent was made a fireman after he returned.[4] Thus the fact that he could not transfer prior to his military service is of no consequence.[5]

For similar reasons, petitioner is incorrect in its claim that respondent is not entitled to retroactive seniority because the decision to hire former "C-2" firemen was an exercise of managerial discretion (Pet. 14-15). Petitioner seeks to bring its claim

[4] To be sure, respondent's transfer to the fireman's job came some two and a half years after he returned to employment. But his claim is the same as it would have been had petitioner made him a fireman immediately upon re-employment, namely, that his seniority in that position should be retroactive to the date he would have become a fireman but for his military service.

[5] Petitioner states that, as a result of the decision below, "[T]he Act * * * not only protects veterans from the erosion of identifiable pre-service rights of seniority, it also prevents the loss of opportunities resulting from military service" (Pet. 12). But this has always been the proper reading of the Act (see *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946)). The answer to petitioner's hypothetical question whether a returning veteran can "bump" another employee (Pet. 12) is Yes. *E.g. Conner* v. *Pennsylvania R.R.*, 177 F.2d 854, 856 (D.C. Cir. 1949). Cf. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 (1976).



within *McKinney* v. *Missouri-Kansas-Texas R.R.*, *supra*, which held that a returning veteran was not entitled to return to a position higher than the one he held when he left, if the promotion to that position depended not on mere seniority but on "fitness and ability and the exercise of a discriminating managerial choice." 357 U.S. at 272. But here the transfer to a fireman's position did not rest on a "discriminating managerial choice"; it was offered to every qualified former "C-2" fireman.[6] Had respondent been there, he would have received it. The fact that petitioner decided to lay on more firemen, or that it decided to offer the positions to former firemen, is not the kind of "managerial discretion" upon which the Act's protections turn.

2. Petitioner to the contrary (Pet. 13-14), the decision below does not conflict with the decisions of any other court. *Conner* v. *Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), held that an employee returning from military service "should have been accorded the privilege of transfer which he would have had had he not been absent in the service." *Id.* at 858. In that case the privilege of transfer was bestowed by the collective bargaining agreement; in this case it was not. But nothing in *Conner* suggests that the result would have been different had the right of transfer existed (as it apparently did here) independent of the collective bargaining agreement.

[6] Consequently, petitioner's assertions that the transfer was "not afforded to all switchmen" and was "totally unrelated to the switchman's job" (Pet. 12) are beside the point.

In fact, the court refused to consider the provisions of the collective bargaining agreement because "*the Act* required that the appellee trainmen must have been offered any opportunity to transfer which they would have had had they not been absent in the service * * *." *Id.* at 858 (emphasis added). Far from conflicting with the decision below, *Conner* supports it.

In *Gregory* v. *Louisville & N. R.R.*, 92 F. Supp. 770 (W.D. Ky. 1950), aff'd, 191 F.2d 856 (6th Cir. 1951), the district court held that returning veterans who had been employed as laborers were not entitled to retroactive seniority after a cross-craft transfer to helpers, despite the fact that some laborers with less seniority had transferred while the veterans were away and thus were senior to the veterans. But the court found there that "[s]ome of such individuals possessed more laborer's seniority than did the plaintiffs, some less and some had no laborer's seniority at all" (*id.* at 772). Although the court did not focus on the question, it appears that the selection of laborers was a matter of managerial discretion, for it was not a function of seniority. In this light, the case is consistent with this Court's later decision in *McKinney*. In any event, *Gregory* is distinguishable from this case, where the petitioner conceded that respondent would have been offered a transfer had he remained at work.

In *Horton* v. *United States Steel Corp.*, 286 F.2d 710 (5th Cir. 1961), the court of appeals found that the transfer of an employee from one installation to



another was "dependent on fitness and ability and the exercise of a discriminating managerial choice" (*id.* at 713) within the meaning of *McKinney*, and thus that a returning veteran had no right to a transfer offered to some other employees while he had been in the military.

Finally, in *Hewitt* v. *System Federation No. 152*, 161 F.2d 545 (7th Cir. 1947), the court held that the returning veteran had no right to a promotion from car cleaner to carman helper simply because some cleaners had been so promoted in his absence. The collective bargaining agreement did not provide for such automatic promotions and there was conflicting evidence over whether such a practice existed independent of the collective bargaining agreement. Here, as we have explained, such a right concededly existed and was extended to former "C-2" firemen not in military service. Thus, even assuming *arguendo* that the collective bargaining agreement here did not bestow such a right, there is no conflict with *Hewitt*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 78-980

# In the Supreme Court of the United States

OCTOBER TERM, 1978

**GRAND TRUNK WESTERN RAILROAD COMPANY,**

*Petitioner,*

vs.

**DONALD R. BARRETT,**

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITIONER'S REPLY MEMORANDUM

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## PETITIONER'S REPLY MEMORANDUM

### THE DECISION BELOW CONFLICTS WITH THE MEANING AND SCOPE OF THE MILITARY SELECTIVE SERVICE ACT.

1. Contrary to respondent's argument (Res. 5), petitioner's position is supported by the language of the Act. The Act merely mandates that a returning veteran *"be restored"* to his pre-service position or one of like seniority, status and pay. 38 U.S.C. §2021(a)(B)(i) (emphasis supplied). To restore means to give back or to put back

into a former or original form or position. *Webster's Third New International Dictionary, Unabridged* (1971).[1] Thus, consistent with the Act, an employee only must return to a veteran those rights and that status which arose out of his pre-service employment. The employer need not duplicate an opportunity which did not exist by virtue of the veteran's position.[2]

Moreover, the requirement that a veteran must be treated as if on "furlough or leave of absence" [38 U.S.C. §2021(b)(1)] does not defeat petitioner's position. As explained in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 287, 90 L.Ed. 1230 (1946), an employee on furlough or leave of absence may accrue benefits which arise out of his position. However, in this case respondent did not have a right to transfer crafts arising out of his switchman's position. The Record clearly indicates that not all switchmen were given an opportunity to become firemen. Thus, while respondent may have been a qualified former C-2 fireman, his qualifications did not arise out of his pre-service employment as a switchman. In fact, assuming that respondent did not enter service, respondent would have been offered the position even if he did not work for petitioner in any capacity at the time of the job opening.

Respondent's reliance on the statutory mandate to give a returning veteran "such status in [his] employment as [he] would have enjoyed if [he] had continued in such

[1] In *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286 n. 10, 287 n. 11, 90 L.Ed. 1230 (1946), the Court relied on dictionary definitions in construing the Act.

[2] The statute also uses the language "reemployed" in connection with an employer's duty under the Act. However, that language only has relevance to situations in which a veteran cannot return to his former position because of a service-related disability. 38 U.S.C. §2021(a)(B)(ii). Such is not the case here.



employment continuously" [38 U.S.C. §2021(b)(2)] is unavailing in light of legislative history. Subsection (b)(2) was added to codify the "escalator principle" enunciated in *Fishgold, supra,* and restated in *Oakley* v. *Louisville & N. R.R.*, 338 U.S. 278, 283, 94 L.Ed. 87 (1949). [*McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, 271, 2 L.Ed.2d 1305 (1958)]. Under the principle's dictates, a returning veteran moves only in accordance with "the terms and conditions affecting that particular employment." *Oakley, supra* at 283, 94 L.Ed. 87. When inducted, respondent was a switchman, and as such he had absolutely no right to transfer to the fireman's craft.

Clearly, the Act only protects rights arising out of the veteran's pre-service employment and nothing more. Contrary to respondent's statement (Res. 5), the fact that respondent lacked any right by virtue of his pre-service switchman's position to transfer crafts bears the utmost relevance to this case. Indeed, it is dispositive of the issue here. Furthermore, respondent's contention that this case stands in a posture similar to *Alabama Power Co.* v. *Davis,* 431 U.S. 581, 52 L.Ed.2d 595 (1977) is incorrect. First, the pension plan in *Alabama Power* constituted a benefit which clearly arose out of Davis' pre-service employment. Secondly, the plan was given retroactive application, in that it covered employees who had completed one year's service with the company. 431 U.S. 581, 582 n.1, 52 L.Ed.2d 595. Thus, the plan operated in practical effect as if it had been established on Davis' first anniversary with Alabama Power—long before his induction into military service. 431 U.S. 581, 582, 52 L.Ed.2d 595. Both factors make *Alabama Power* readily distinguishable.

The seventh circuit decision improperly extends the Act's protective umbrella to prevent the loss of opportunities because of military service. Nothing in *Fishgold, supra* (Res. 5, n.5) or any other decision supports that

position, and, indeed, *Fishgold* dictates the opposite conclusion. Furthermore, respondent's affirmative answer to petitioner's hypothetical (Res. 5, n.5) does not follow from his citations. In *Conner* v. *Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), unlike the present case, the veteran had a clear right resulting from the collective bargaining agreement and established employer practices to transfer positions. 177 F.2d 854, 859. Moreover, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 47 L.Ed.2d 444 (1976) concerned the extent of relief available to deserving Title VII litigants. The citations to veterans' rights cases (*Id.* at 784) assumed, in line with the opinion itself, that the veterans were entitled to relief. Since the issue presented by petitioner's hypothetical and this case is whether respondent is entitled to relief, respondent's citations merely beg the question instead of answering it.

The decision below is clearly erroneous and merits review.

2. Respondent cannot reconcile the conflict among circuit decisions. In *Conner* v. *Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), defendant veterans, employed prior to service as freight trainmen, were allowed to transfer to passenger trainmen positions and were given seniority dates ahead of plaintiff passenger trainmen. The court grounded its ruling on the fact that under the collective bargaining agreement, defendants had a clear right to transfer positions. 177 F.2d 854, 857-59. Respondent argues that nothing in *Conner* suggests that the result would have been different if the right to transfer existed independent of the agreement (Res. 7). Yet, respondent points to nothing in *Conner* indicating that the result would have been the same. Clearly, respondent cannot hypothecate a new situation in order to reconcile conflicting decisions.

Moreover, respondent incorrectly argues that he had a right to transfer which existed independent of the collective bargaining agreement (Res. 7). Respondent had, at very best, an opportunity to transfer, and unlike *Conner*, this opportunity had absolutely no connection to his pre-service position as switchman.



Respondent erroneously states that *Conner* refused to consider the collective bargaining agreement because the Act, by itself, protected the veterans (Res. 8). Rather, the court refused to consider whether the collective bargaining agreement was binding on plaintiffs, *i.e.*, the persons bumped by the returning veterans. 177 F.2d 854, 858. Indeed, after extensively considering the agreement, the court found that it gave the veterans the right to transfer positions and, consequently, the Act required that the veterans be properly restored that right.

Similarly, *Gregory* v. *Louisville & N. R.R.*, 92 F. Supp. 770 (W.D. Ky. 1950) *aff'd* 191 F.2d 856 (6th Cir. 1951) is irreconcilable. In *Gregory*, upon plaintiffs' return from duty, they were allowed to transfer crafts and were given seniority dates just ahead of persons of lesser seniority who transferred crafts during plaintiffs' absences. 92 F. Supp. 770, 772, 774. Plaintiffs brought suit after a subsequent collective bargaining agreement revised their seniority to the date on which plaintiffs were actually regularly assigned to the new craft. Noting that persons of greater and lesser seniority were allowed to transfer crafts during the *Gregory* plaintiffs' military absence, respondent erroneously concludes that the transfers were based on managerial discretion (Res. 8). However, the mere fact that persons of various seniority levels were allowed to transfer crafts simply demonstrates the extent of the employer's need for transferees while plaintiffs were in service, and not the reason for the choice of particular transferees. Not only did the court not "focus" (Res. 8) on the issue of managerial discretion, it did not mention or even intimate that the issue of managerial discretion had any bear-

ing on its decision. Instead, the decision focused on plaintiffs' lack of any right to transfer. Recognizing that plaintiffs had no right to transfer crafts by virtue of their pre-service positions, the court rejected plaintiffs' claim for retroactive seniority benefits. 92 F. Supp. 770, 776-77. The *Gregory* court also noted that the "great presumption or strong probability" that plaintiffs would have transferred had they remained at home did not entitle them to the Act's protections. 92 F. Supp. 770, 777. Consequently, respondent's reliance on the fact that in this case he would have been offered an opportunity to transfer is misplaced.

In *Horton* v. *United States Steel Corp.*, 286 F.2d 710 (5th Cir. 1961), the court recognized that managerial discretion played a role in the denial of veteran's benefits. However, after noting that the collective bargaining agreement has "substantial, if not decisive, significance" in determining veterans' rights (286 F.2d 710, 712), the court also stated that the veteran had no enforceable right to transfer. *Id.* at 713. In this case, the court of appeals improperly bestowed on respondent a right which did not belong to him.

Finally, respondent's purported distinction of *Hewitt* v. *System Federation No. 152,* 161 F.2d 545 (7th Cir. 1947) is incorrect. In *Hewitt,* the court stated that plaintiff, in his pre-service position as a car cleaner, had no right to transfer to the carmen helper position. In this case, respondent argues that qualified former C-2 firemen had the right to transfer. However, C-2 firemen did not have a right to transfer; rather, they were given an opportunity to transfer. Moreover, in his pre-service position, respondent was employed as a switchman, not a C-2 fireman, and respondent's lost opportunity to transfer did not arise out of his switchman's position. Indeed, many of the C-2 firemen were not employed in any capacity by petitioner at



the time the opportunities arose. Thus, *Hewitt* stands at odds with the decision below.[3]

The irreconcilable conflict among circuit decisions justifies the granting of certiorari.

3. This case involves a proper exercise of managerial discretion. While the factual setting in *McKinney* v. *Missouri-Kansas-Texas R.R.,* 357 U.S. 265, 2 L.Ed.2d 1305 (1958) involved the exercise of managerial discretion respecting a veteran's "fitness and ability", *McKinney* certainly recognized the broad concept of managerial discretion. The Court stated:

> The statute manifests no purpose to give to the veteran a status that he could not have attained *as of right, within the system of his employment,* even if he had not been inducted into the Armed Forces but continued in his civilian employment.
>
> Thus, on application for re-employment a veteran is not entitled to demand that he be assigned a position higher than that he formerly held when promotion to such a position depends, not simply on seniority or some other form of automatic progression, *but on the exercise of discretion on the part of the employer.*

375 U.S. 265, 272, 2 L.Ed.2d 1305 (emphasis supplied). Petitioner here retained absolute discretion respecting transfers of personnel to the fireman craft, and it was not bound to exercise that discretion in favor of respondent or anyone else.

This case presents an excellent opportunity to define the boundaries of the principle of managerial discretion. It

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[3] Respondent assumes *"arguendo"* (Res. 9) that the collective bargaining agreement covering switchmen does not bestow a right to transfer. Such an assumption is unnecessary, for clearly no such right existed under the agreement. Neither respondent nor the seventh circuit could ever identify a right to transfer under the agreement.

ultimately questions whether an employer can use an employee's absence due to military service as the sole and precise ground for a particular exercise of managerial discretion. In this light, the case truly merits Supreme Court review.

## CONCLUSION

For the foregoing reasons, petitioner Grand Trunk Western Railroad Company urges this Most Honorable Court to issue a writ of certiorari to review the judgment and opinion of the seventh circuit.

Respectfully submitted,

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